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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
Cross-Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MICHIGAN, OKLAHOMA, UTAH, WEST VIRGINIA, AND WISCONSIN, AS *AMICI CURIAE* IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether a district court has authority pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, to review a final Medicaid disallowance decision by the Secretary of Health and Human Services and to issue an order requiring prospective compliance with the law.

2. Whether a district court has authority to order adjustment of a state's Medicaid grant account to reflect federal funding for services that had been disallowed by the Secretary.

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INTEREST OF THE *AMICI CURIAE*

Amici are thirteen states that participate in federal matching fund programs authorized by the Social Security Act, including Medicaid (Title XIX). These states periodically experience disallowances by the Department of Health and Human Services of federal matching funds for these programs, just as the Commonwealth of Massachusetts has experienced in this case. The impact of a disallowance on the nature of state public assistance programs can be substantial. Thus, these states have a vital interest in the determination of the appropriate forum for judicial review of final administrative disallowance actions.

Amici believe that the district courts provide a better setting than the Claims Court for informed judicial review of administrative decisions under federal grant programs such as Medicaid. These exercises in cooperative federalism permit considerable variation among state programs, giving the states needed discretion to meet local needs. Each local district court has the opportunity to become familiar with the individual characteristics of the grant programs in its state, which supply the necessary context for resolving the complex legal issues that arise in disallowance disputes. As a national forum, the Claims Court would be unable to develop the same degree of expertise with respect to the nuances of each state's Medicaid and other grant programs. Accordingly, *amici* urge that the Court implement Congress's intent to authorize judicial review in the district courts under the Administrative Procedure Act.

STATEMENT

1. The Medicaid program is the largest of several cooperative federal-state programs operated under the authority of the Social Security Act to provide medical, financial, and other assistance to needy citizens. Each state develops its own unique assistance programs within the broad framework established by federal law. The programs vary considerably among states with respect

to the nature and extent of the public assistance they provide. Federal funds are made available at prescribed matching rates to reimburse state program expenditures. The complex nature of the programs often requires difficult interpretation of federal criteria in the context of the actual coverage and operation of a specific state's assistance plan.

To participate in the federally-authorized programs, states submit plans that set forth the scope of their programs and other information required by federal law. State plans and the amendments periodically made to them are subject to approval by the Department of Health and Human Services (HHS).

The programs are structured to provide states with the federal share of program costs in advance, in order to encourage states to maintain adequate levels of benefits for their needy beneficiaries. Grants, normally on a quarterly basis, are made to states based on estimates of the federal share of expenses they will incur in the coming quarter. After each quarter, states file reports of their actual expenditures. The actual expenditures are reconciled with the amounts granted pursuant to previous estimates, and the differences (positive or negative) are reflected in the next grants to the state in the particular programs. *See* Pet. App. 2a; 42 U.S.C. § 1396b(d).

Expenditure reports are reviewed by federal officials to determine the allowability of various categories of expenses claimed as the basis for federal funding. If the federal officials believe that a particular claim is not subject to federal matching, it is disallowed. Even if a claim is allowed at the time of expenditure report review, this decision can be reversed upon subsequent audit by federal auditors. There are procedures for administrative review of disallowance actions, culminating in a proceeding before an employee board established by the Secretary, called the Departmental Grant Appeals Board. 42 U.S.C. § 1316(d); 45 C.F.R. Part 16.

When a claim is disallowed, the amount involved is offset from subsequent grants to the state reflecting federal funding for the cost of future state activities in the same program. A state may elect to retain the amount in dispute pending final agency action. Unlike other grant programs, however, under Medicaid the state is subject to an interest obligation for the period between the initial disallowance and the final determination upholding the disallowance if it does elect to hold the disputed funds. 42 U.S.C. § 1396b(d)(5).

Initially, disallowance actions were infrequent and usually resulted from audits. Moreover, they tended to be based upon computational errors or asserted erroneous cost calculations. Federal practices have, however, changed in recent years. It is now common for HHS to issue disallowances upon review of expenditure reports, either immediately or following "deferral" and a request for submission of further documentation by the state. *See* 45 C.F.R. § 201.15. In addition, audit activities, now under the HHS Inspector General, have materially increased.

The nature of disallowances has also changed significantly. Instead of being confined to computational matters, the disallowance has become an important mechanism for determining policy concerning the structure and scope of the assistance programs. The disallowance has become a significant means by which HHS "implement[s] important policies governing ongoing programs." Pet. App. 4a; *see also id.* at 81a-82a ("significant legal questions • • • can arise from disallowances based on audits") (Board decision).

The evolution of the disallowance process is explained to a large extent by the implementation and growth of the Medicaid program since its enactment in 1965. Medicaid is one of the most complex and extensive programs of the federal government. There is a vast body of published and informal regulations setting forth federal program policy and requirements on thousands of sub-

jects. The development of the disallowance process within HHS coincides with the growing utilization and expansion of the Medicaid program in the various states.

2. The present case illustrates how the disallowance process has been used to deal with broad and important policy issues concerning the scope of public assistance programs. The issue is whether Medicaid covers certain categories of services to mentally retarded persons in public institutions designed to help them "achieve some degree of independence and self-care." Pet. App. 2a. Resolution of this issue requires interpretation of section 1905(d) of the Social Security Act, 42 U.S.C. § 1396d(d), which authorizes Medicaid coverage of "health or rehabilitative services" for mentally retarded persons in public institutions, and review of an HHS regulation, 42 C.F.R. § 441.13(b), which prohibits federal reimbursement in these circumstances for "vocational training and educational activities." A decision on the merits also requires understanding the precise nature of the services provided by Massachusetts, as well as the relationship between the Medicaid program and the Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, which makes federal funds available for certain special education services if a state provides a specified minimum level of such services.

Following a hearing, the Grant Appeals Board issued two lengthy decisions resolving the legal issues by holding that the services provided to retarded persons by Massachusetts were not within the scope of the Medicaid program. Pet. App. 39a-84a. In accordance with standard procedures, HHS implemented the decisions by deducting the amounts disallowed from future reimbursement grants to the state.

The state sought judicial review in the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1331 and the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702. *See* Pet. App. 89a-90a, 95a-96a. The state asked

the court to "[s]et aside" the Board's decisions and to issue an injunction prohibiting HHS from refusing to reimburse it for the disallowed expenditures. *Id.* at 93a, 98a. In accordance with HHS policy, the Secretary expressly consented to the jurisdiction of the district court. *See* No. 87-712 Br. in Opp. 6.

On the merits, the district court concluded that the services in question "fall clearly within the category of habilitative services explicitly covered" under the Medicaid statute, and that the state was therefore entitled to federal reimbursement. Pet. App. 26a. The district court entered summary judgment for the state, and it "reversed" the Grant Appeals Board. *Id.* at 32a, 36a. No injunction was entered, nor did the district court order an award of damages.

The court of appeals affirmed in part and vacated and remanded in part. Pet. App. 1a-16a. Acknowledging that the merits presented "a difficult question of statutory interpretation under the Medicaid Act" (*id.* at 1a), the court of appeals agreed with the district court that "the services in question here are reimbursable 'medical assistance,'" and it directed HHS "to develop a Medicaid audit procedure that looks behind * * * [labels] to determine whether services are reimbursable" (*id.* at 16a). The court of appeals further held that the Secretary's interpretation of the regulation at 42 C.F.R. § 441.13(b) to exclude coverage for these services "violates the Medicaid Act." *Id.* at 14a.

With respect to jurisdiction, the court of appeals held that the district court properly entertained the complaints insofar as they constituted a prospective challenge seeking to "define[] the respective roles of the Commonwealth and HHS in a continuing program." Pet. App. 4a. The court noted the significance of prospective relief to the state, since the program in question remains in operation and "the legal issues involved have ramifications that affect other aspects of the Med-

icaid program." *Id.* at 5a. Thus, "[w]hat is at stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." *Id.* The court of appeals therefore held that "the district court below had jurisdiction to review the disallowance decision * * * and to grant declaratory and injunctive relief." *Id.* at 6a.

The court of appeals also held, however, that the district court "could not * * * order the Secretary to pay money." Pet. App. 6a. This followed, in the court of appeals' view, from the exclusion of claims for "money damages" from the waiver of sovereign immunity in 5 U.S.C. § 702. The court of appeals expected the Secretary to adjust the running total in the state's reimbursement account to reflect coverage of the disputed services, and it concluded that the state could seek relief in the Claims Court if the Secretary refused to do so. *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

By its complaints filed in the district court, Massachusetts sought the usual relief requested and authorized under the Administrative Procedure Act: invalidation of an agency decision and an order requiring the agency to abide by the law. In a radical departure from prior understanding, the Solicitor General argues that the Tucker Act somehow trumps the APA and establishes the Claims Court as the sole tribunal for judicial review in actions that may have monetary consequences for the federal government. The language, legislative history, and policies of the APA and the Tucker Act do not support such a result.

Amici wish to emphasize that district court review of agency action in programs such as Medicaid serves three policies, which should inform the Court's decision in this case. First, Medicaid and other cooperative federal-state programs are not monolithic enterprises that would benefit from centralized national judicial review.[1] The nature and scope of assistance provided by each state are unique —federal law establishes only certain criteria and limitations, leaving states free to choose among many options as required to meet local needs in light of local governmental resources. While federal law is uniform throughout the nation, its application to a particular state's services often can only be determined in light of a thorough understanding of the state's plan and the services it actually provides to beneficiaries.[2] The local federal district courts have developed a familiarity with the unique characteristics of their states' public assistance plans, which a central tribunal such as the Claims Court cannot duplicate.

Second, requiring states and other litigants to seek relief only in the Claims Court, with review in the Federal Circuit, "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). It also "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question" and would require the Court "to revise its practice of waiting for a conflict to develop before granting * * * certiorari." *Id.* This Court has in the past been able to wait for circuit conflicts before resolving issues arising out of disallowances; in this very case the Solicitor General did not seek review on the merits

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[1] Congress recognized this by providing for direct review of certain decisions affecting the scope of state Medicaid plans in the regional courts of appeals. *See* 42 U.S.C. § 1316.

[2] This is well-illustrated in the instant case, where the administrative record included exhibits such as a videotape of services provided by the state. *See* Pet. App. 53a n.1. The district court relied on this record in reaching its decision. *Id.* at 18a n.1, 26a. The court of appeals also noted the importance of understanding the character of the services actually provided by the state. *See id.* at 15a-16a.

because "no conflict among the courts of appeals has developed" (Pet. 10-11 n.5).

Finally, as states, *amici* are concerned that they have access to the Article III forum made available under the APA. The Framers provided that certain actions involving states as parties could be resolved by the Article III judiciary, specifically under this Court's original jurisdiction. *See* U.S. Const. Art. III, cl. 2. The spirit of cooperative federalism that animates programs such as Medicaid would best be served by resolving disputes between the federal and state governments before judges enjoying the protections of Article III.

• • • •

In point I below, we demonstrate that the potential retrospective impact of the district court's decision did not deprive that court of authority under the APA to issue prospective relief, even if the retrospective impact could be characterized as money damages. The Tucker Act may make the Claims Court the exclusive forum for monetary claims against the United States, but that statute does not require every suit that could be interpreted to include a monetary claim to be brought in the Claims Court, in derogation of the district court's authority under the APA. Equitable relief should be available in the district courts on review of administrative action unless the request for such relief is a sham whose only purpose is to lay the foundation for a money judgment. That is not the case here or in other typical actions for review of the administration of federal grant programs, since declaratory and other prospective orders are necessary to provide complete relief.

The equitable remedies available in the Claims Court were, at the insistence of the Department of Justice, sharply limited as compared to those in the district courts. The Claims Court therefore does not provide an "adequate remedy" that would make review unavailable under the APA. To the extent that a judgment in one

forum might bind the other, it has long been accepted that the district court should bind the Claims Court rather than the other way around.

In point II, we show that the retrospective relief granted Massachusetts was not the sort of claim for money damages that lies outside the APA and solely within the Tucker Act. Petitions for review are often filed before funds are recouped by the federal government, so that the action cannot be characterized as one seeking the return of money held by the government. Moreover, the adjustment of the state's grant account does not resemble a traditional award of money damages that must be sought in the Claims Court. Finally, the impoundment cases make clear that orders, such as the district court's judgments here, requiring the release of appropriated funds can be entered against a federal official by a district court under 28 U.S.C. § 1331 without any waiver of sovereign immunity. The district court therefore was authorized to award complete relief to the state.

ARGUMENT

I. THE DISTRICT COURT HAD AUTHORITY TO REVIEW THE BOARD'S DECISIONS AND TO REQUIRE THE SECRETARY TO APPLY THE CORRECT LEGAL STANDARD IN FUTURE MEDICAID REIMBURSEMENT DETERMINATIONS

The district court held that Massachusetts was entitled to federal financial participation for the disputed services. The Solicitor General acknowledges (Br. 15 n.11, 37) that if only funding for future services were at issue, the district court would have been authorized by the grant of jurisdiction in 28 U.S.C. § 1331 and the waiver of sovereign immunity in 5 U.S.C. § 702 to set aside the agency's decision and to order the Secretary to comply with the law. The fact that funding for services already rendered also was in dispute did not

deprive the district court of its authority to issue prospective equitable relief.[3]

A. The State's Request For Prospective Relief Is Typical Of Countless Petitions For Review Of Administrative Action For Which Congress Has Waived Sovereign Immunity In Section 702 Of The APA

In 1976, Congress amended section 702 of the APA to waive the defense of sovereign immunity "in all equitable actions for specific relief"[4] and amended the general grant of federal question jurisdiction to eliminate the amount-in-controversy requirement for actions against the United States and federal officials. Pub. L. No. 94-574, 90 Stat. 2721 (1976). The primary purpose of these amendments was to provide for "the orderly, rational review of actions of Federal officers" by eliminating the defense of sovereign immunity, with its "wispy fictions" and "doctrinal confusion."[5] In addition, Congress noted that suits for review of agency action "are appropriate matters for the exercise of Federal judicial power,"[6] and it therefore consolidated jurisdiction in the district courts

[3] We assume in this portion of the brief that the court of appeals correctly held that there was a retrospective aspect of the case beyond the district court's authority. As we demonstrate in point II, however, the relief afforded by the district court did not encompass money damages that could be awarded solely under the Tucker Act. If the Court accepts that position, then the district court's jurisdiction over the prospective aspect of the case is clear as well.

[4] H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976).

[5] S. Rep. No. 996, 94th Cong., 2d Sess. 3, 5 (1976). The Solicitor General's reliance (Br. 16 & n.13) on cases strictly construing other waivers of sovereign immunity is misplaced in view of the remedial purposes of the APA and "the strong presumption that Congress intends judicial review of administrative action" under this statute. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

[6] S. Rep. No. 996, *supra*, at 12.

by eliminating the amount-in-controversy requirement in 28 U.S.C. § 1331.

Congress specifically noted that it intended to waive sovereign immunity for actions challenging the "administration of Federal grant-in-aid programs"[7] such as Medicaid, which "often result in the payment of money from the federal treasury."[8] This Court had already held that such programs could not be challenged under the Tucker Act. *Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam). Accordingly, by waiving sovereign immunity in the APA, Congress intended, at the very least, that actions for prospective relief in these cases could be brought in the district courts.

There is nothing unusual about the prospective element of review of Medicaid disallowance decisions. These actions raise the same sorts of legal issues, and contemplate the same sorts of declaratory and other equitable relief, that are grist for the judicial mill under the APA. Courts have consistently held that disallowance decisions are reviewable,[9] and indeed this Court resolved on the

[7] H.R. Rep. No. 1656, *supra*, at 9.

[8] Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441, 1447 (D.C. Cir. 1985) (Bork, J.). The Solicitor General argues (Br. 33-34 & n.27) that Congress's express intent to provide APA review of federal grant programs should be disregarded because the grant cases of which Congress was aware prior to 1976 did not involve "attempts to secure monetary relief." To the contrary, both of the cases cited by the Solicitor General were actions seeking federal grant funds by challenging the legality of the federal government's withholding of such funds—precisely the basis for the state's claims here. *See* Dermott Special School Dist. v. Gardner, 278 F. Supp. 687, 690 (E.D. Ark. 1968) (plaintiff challenged "withholding of federal financial assistance"); Lee County School Dist. No. 1 v. Gardner, 263 F. Supp. 26, 30 (D.S.C. 1967) (plaintiffs sought order directing federal officials "to cease an allegedly unlawful interference with the flow of funds to which the plaintiffs are already otherwise legally entitled").

[9] *See, e.g.*, Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441 (D.C. Cir. 1985); Michigan Dep't of Human Services v. Secretary of Health & Human Services, 744 F.2d 32 (6th Cir.

merits a conflict in the circuits arising under the Medicaid program in a suit seeking review of a disallowance decision. *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985).

The prospective relief awarded in these cases is precisely the sort intended by Congress when it amended the APA: agency action is set aside, and the responsible officials are directed to comply in the future with the law as declared by the district court. The Secretary recognizes that "significant legal questions • • • can arise from disallowances based on audits." Pet. App. 81a-82a; *see also Connecticut Dep't of Income Maintenance*, 471 U.S. at 528 (resolving "important question of statutory construction" on review of disallowance decision). Congress passed the APA to ensure that persons have access to the district courts for resolution of such questions.

B. The Tucker Act Does Not Provide An "Adequate Remedy" That Would Make The Secretary's Decisions Unreviewable Under Section 704 Of The APA

Notwithstanding the routine nature of the prospective relief sought by the State, the Solicitor General argues (Br. 43-44) that administrative review lies only in the Claims Court in part because an action under the Tucker Act allegedly provides an "adequate remedy" making the Secretary's decisions unreviewable agency action under section 704 of the APA. The Tucker Act remedy, however, is wholly inadequate because the Claims Court cannot provide the declaratory and injunctive relief available in the district court. Review under the APA therefore is not precluded under section 704.[10]

1984); Oregon Dep't of Human Resources v. DHHS, 727 F.2d 1411 (9th Cir. 1983); Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273 (7th Cir. 1983); New Jersey v. DHHS, 670 F.2d 1300 (3d Cir. 1981).

[10] The Solicitor General's argument that an award of money damages under the Tucker Act provides an adequate remedy under section 704 is inconsistent with his admission (Br. 15 n.11, 37) that wholly prospective challenges (where past funding has been waived) can be brought in the district courts under the APA. If money damages were an adequate remedy, a state could not obtain APA review of a disallowance by waiving past funding. Rather, it would be required to wait for a subsequent disallowance and then to sue for the relevant funds in the Claims Court—a burdensome practice wholly at odds with Congress's intent to provide federal Medicaid funds to the states on a current basis.

Prior to 1972, the Claims Court (formerly the Court of Claims) had no power to enter any sort of equitable relief. *See, e.g., United States* v. *King*, 395 U.S. 1 (1969). The Tucker Act was then amended to give the Court "the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." Pub. L. No. 92-415, 86 Stat. 652 (1972) (amending 28 U.S.C. § 1491). Congress plainly intended, and the courts have held, that this circumscribed remand power is considerably more limited than the equitable remedies available in the district courts.

In 1968, Congress considered an amendment to the Tucker Act that would have authorized the Court of Claims to grant "such relief as the district courts may issue."[11] This provision would have made "available in Court of Claims cases the full spectrum of judicial remedies."[12] The bill passed the Senate but failed in the House.

The same measure was introduced in 1972. The Justice Department expressed concerns, however, that the bill "is most broad and confers on the Court of Claims all the power and authority a district court possesses in civil litigation."[13] The Department opposed giving the Court of Claims such broad authority "over a wide range of governmental activities" or authorizing persons to

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[11] S. 1704, 90th Cong., 2d Sess. (1968).

[12] S. Rep. No. 1465, 90th Cong., 2d Sess. 4 (1968).

[13] *Collateral Relief in the Court of Claims: Hearings on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 114 (1972).

"claim all sorts of relief against any agency of the Government." [14] The Department was specifically opposed to giving the Court of Claims the power to issue declaratory judgments, injunctions, and mandamus-type orders.[15]

The Justice Department therefore proposed amending the bill to limit the Court's authority to the remand orders now provided (as well as other orders in personnel actions).[16] With an insignificant change, the bill was reported and enacted in the limited form proposed by the Justice Department.[17]

This legislative history makes plain that Congress intended (and the Justice Department understood) the remand power given the Court of Claims to be considerably more limited than the equitable remedies available in the district courts. Consistent with the legislative history, this Court and the Court of Claims have held since 1972 that the Tucker Act does not authorize permanent or preliminary injunctive relief, declaratory judgments, or writs of mandamus.[18] The limited equitable relief available under the Tucker Act therefore does not constitute an "adequate remedy" that can substitute for relief in

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[14] *Id.* at 121, 123.

[15] *Id.* at 121, 127.

[16] *Id.* at 124.

[17] *See* H.R. Rep. No. 1023, 92d Cong., 2d Sess. 5 (1972).

[18] *See, e.g.*, Lee v. Thornton, 420 U.S. 139 (1975) (per curiam); Richardson v. Morris, 409 U.S. 464 (1973) (per curiam); Smith v. United States, 654 F.2d 50, 53 (Ct. Cl. 1981). In the Federal Courts Improvement Act, Congress for the first time gave the Claims Court authority to enter declaratory judgments, injunctions, and other equitable relief in certain contract cases. *See* Pub. L. No. 97-164, § 133, 96 Stat. 25, 40-41 (1982) (codified at 28 U.S.C. § 1491(a)(3)). Congress's express reference to these remedies and its limitation on the class of cases in which they may be exercised confirm that the Claims Court does not impliedly possess broad equitable powers in other types of cases. *See also* S. Rep. No. 1066, 92d Cong., 2d Sess. 3 (1972) (remand power available only in government contract disputes); H.R. Rep. No. 1023, *supra*, at 4 (same).

the district courts. *See Melvin* v. *Laird*, 365 F. Supp. 511, 520-521 (E.D.N.Y. 1973) (Weinstein, J.).

The limitations on the Claims Court's equitable powers are not merely of theoretical concern. Suits challenging federal administration of grant-in-aid programs often seek detailed injunctions directing future governmental action. Such detail is necessary in view of the complexity of the programs, but it is well beyond the authority of the Claims Court. In addition, preliminary injunctions often are necessary in order to prevent irreparable harm, particularly to individual beneficiaries. Finally, the absence of a prospective declaration of the law could require states and private litigants to return to the Court again and again, each time seeking retrospective funding for discrete time periods, rather than authoritatively resolving the matter in a single suit. In view of these pragmatic concerns, as well as the limitations on equitable relief intended by Congress under the Tucker Act, a suit in the Claims Court cannot be considered an "adequate remedy" within the meaning of section 704 of the APA.

C. The Tucker Act Does Not Override The APA By Requiring Every Action That May Include A Claim For Monetary Relief To Be Brought In The Claims Court

The Tucker Act provides that the Claims Court "shall have jurisdiction to render judgment upon any claim [for money damages] against the United States." 28 U.S.C. § 1491(a)(1). The Solicitor General would read this provision to mean that the Claims Court "shall have *sole* jurisdiction to render judgment upon any suit that *includes* a claim for money damages against the United States." Such an interpretation is not only at odds with the language of section 1491, it is directly contrary to the legislative history of the Tucker Act.

There is no significant claims-splitting problem that requires twisting the statutory language to vest exclusive jurisdiction over suits for prospective and monetary

relief in the Claims Court. Rather, the position urged by the Solicitor General would increase the burdens of duplicative litigation in different forums. Moreover, courts—including the Court of Claims—have recognized that if claims must be split, the prospective elements should be adjudicated first, so that collateral estoppel will run from the Article III district court to the Article I Claims Court, rather than the other way around.

No inquiry into the "primary purpose" of the complaint or the "substantial effect" of the judgment is necessary to protect the role of the Claims Court. Litigants should be barred from seeking initial equitable relief in the district courts only where "[t]he *only* value to [plaintiffs] of the declaratory judgment [or other equitable relief] they seek would be to have it serve as res judicata in the Claims Court." *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 590-591 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1974) (emphasis added); *accord Melvin* v. *Laird*, 365 F. Supp. 511, 520 (E.D.N.Y. 1973).[19] This rule ensures that the jurisdiction of the Claims Court will not be evaded by artful pleading, yet allows the plaintiff to be " 'absolute master of what jurisdiction he will appeal to;' "[20] avoids fruitless inquiries into purpose and effect; and gives full force to the policies that impelled Congress to authorize suits for judicial review of administrative action in the district courts under the APA.

[19] *Cf.* Green v. Mansour, 474 U.S. 64, 73 n.2 (1985) (suit seeking declaratory judgment barred by Eleventh Amendment where "the declaratory judgment would serve no purpose" other than as a basis for an award of damages in state court).

[20] United States v. Mottaz, 476 U.S. 834, 850 (1986), *quoting* Healy v. Sea Gull Specialty Co., 237 U.S. 479, 480 (1915) (Holmes, J.).

1. *Nothing in the language or legislative history of the Tucker Act restricts the APA's waiver of sovereign immunity for actions in the district courts*

As noted above, the language of the Tucker Act does not support the position that the Claims Court has exclusive jurisdiction—in derogation of the presumption of reviewability under the APA—of any suit that seeks both prospective and retrospective relief. This is confirmed by an examination of the 1972 amendments to the Tucker Act, which for the first time gave the Court of Claims limited equitable powers (*see* pages 13-14, *supra*). Prior to that time, persons seeking both equitable and monetary relief were generally required to bring separate actions in the Court of Claims and in the district court. The additional authority granted the Court of Claims in 1972 allowed some actions to be brought entirely in that forum, but it was not intended, *sub silentio*, to restrict the powers of the district court. As explained by Judge Weinstein:

> "The legislative history of the 1972 amendment makes manifest that the motivation for its enactment was a Congressional desire to respond to the need of the Court of Claims to implement its monetary judgments with collateral equitable relief, so that litigants, *if they so desired*, would be able to obtain complete relief in the Court of Claims. The legislative background, however, leaves little doubt that the added powers of the Court of Claims to grant incidental relief were in no way intended to oust the jurisdiction of the district courts to act pursuant to its mandamus and declaratory judgment powers."

Melvin v. *Laird*, 365 F. Supp. 511, 518 (E.D.N.Y. 1973) (emphasis in original).

This view is confirmed by the legislative history, which makes clear that Congress did not intend in 1972 to expand the jurisdiction of the Court of Claims.[21] The Court

[21] *See* S. Rep. No. 1066, *supra*, at 1; H.R. Rep. No. 1023, *supra*, at 3; United States v. Testan, 424 U.S. 392, 404 n.7 (1976).

of Claims was not authorized before 1972 to be a central forum for review of administrative action, and nothing in the 1972 amendment changed that. *See Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam) (Tucker Act did not authorize suit for declaratory relief under the Social Security Act); *Lee* v. *Thornton*, 420 U.S. 139 (1975) (per curiam) (Tucker Act did not authorize suit seeking return of money and declaratory relief under the customs laws).

If Congress had believed that the Court of Claims already had jurisdiction to hear routine administrative review actions, the 1976 amendments to the APA waiving the defense of sovereign immunity for actions in the district courts would have been unnecessary. The record shows, however, that no one contended that these actions—such as suits for review of federal grant programs—could already be heard under the Tucker Act; rather, Congress waived sovereign immunity in the APA to ensure that they could be heard in the district courts.[22] Congress intended that contract actions and other claims for which the Tucker Act provided an exclusive remedy could not be brought under the APA, but there is no indication that it thought that suits such as the present one fell into that category.[23]

2. *Ousting the district courts of jurisdiction would increase burdens on litigants and courts*

The Solicitor General argues (Br. 39-42) that vesting exclusive jurisdiction in the Claims Court is necessary to avoid claims-splitting and duplicative litigation. In fact,

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[22] *See* S. Rep. No. 996, *supra*, at 5-10; H.R. Rep. No. 1656, *supra*, at 4-11.

[23] *See* S. Rep. No. 996, *supra*, at 11-12; H.R. Rep. No. 1656, *supra*, at 12-13. The Solicitor General's argument (Br. 44-46) that the Tucker Act "impliedly forbids" suits for administrative review under the APA is therefore incorrect. *See also* pages 12-13 note 10, *supra*.

such exclusive jurisdiction would produce exactly the opposite result.[24]

As a practical matter, the rule established by the court of appeals would not require a litigant to bring two lawsuits. In the usual case, the government ought to be expected voluntarily to obey the law as declared by the district court and to continue funding as necessary to conform to that law. Only when government officials fail to obey the law would a second action be necessary. *See* Pet. App. 6a; *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 860 n.14 (8th Cir. 1983).[25] Thus, there is at present no burden that must somehow be alleviated by interpreting the Tucker Act to restrict the APA.

Such an interpretation would create precisely the burdens that the Solicitor General seeks to avoid. In addition to actions by states for review of disallowances, suits raising issues of federal Medicaid law often are brought by beneficiaries against their state agencies. The state may then seek to implead the federal government as a third-party defendant, so that all issues may be resolved in a single action in federal district court. Under the Solicitor General's interpretation, that would no longer be possible. The claims of beneficiaries against the state cannot be decided in the Claims Court, and related claims of the state against the federal government could not be decided in the district court. Since the federal government was not a party to the district court action, it presumably would be free to relitigat the issues in the

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[24] The Solicitor General also erroneously argues (Br. 42) that district court jurisdiction would lead to forum shopping. States and other litigants, however, have preferred to seek review of administrative action in the local Article III district courts rather than in the Article I Claims Court. Upholding district court jurisdiction in this case would not change this practice.

[25] Even if federal officials did not obey the law, the state would not be required to go to the Claims Court, since the district courts retain jurisdiction to order officials to disburse appropriated funds. *See* Connecticut v. Schweiker, 684 F.2d 79 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); pages 26-28, *infra*.

Claims Court. There is no indication that Congress intended to require such a burdensome practice.

3. *Collateral estoppel should run from the district courts to the Claims Court*

It may be that the nature of suits seeking both prospective and retrospective relief—a possibility not considered by Congress[26]—requires in some instances that either the Claims Court be bound by a prior adjudication in the district court, or the district court be bound by a determination in the Claims Court.[27] The courts have consistently held in these circumstances that it is appropriate to resolve the district court action first, and for the Claims Court to adhere to the law as declared by the district court.[28] This does not make the Claims Court a "mere paymaster"—it simply recognizes the primary role of the district courts in reviewing the legality of administrative action under the APA, leaving to the Claims Court those areas, such as government contracts, where Congress intended that tribunal to be preeminent.

As one court of appeals has stated, there is "no threat to Claims Court jurisdiction in the fact that collateral estoppel may require the Claims Court to adhere to a district court determination of the lawfulness of government conduct." *Hahn* v. *United States*, 757 F.2d 581, 589

[26] *See, e.g., Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 91st Cong., 2d Sess. 58 (1970) ("All suits seek either monetary or non-monetary relief.") [hereinafter cited as *Sovereign Immunity Hearing*].

[27] As we demonstrate below, this is not such a case because the district court was authorized to grant complete relief.

[28] *See, e.g.*, Hahn v. United States, 757 F.2d 581, 589 (2d Cir. 1985); Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71 n.15 (1978); Greene v. McElroy, 360 U.S. 474 (1959) (initial suit in district court for injunctive relief in personnel action); Greene v. United States, 376 U.S. 149 (1964) (subsequent suit in Court of Claims for monetary relief).

(3d Cir. 1985). The Court of Claims agreed with this analysis: the district court should have "a free hand to render judgment on the * * * nonmonetary claims, * * * [even when] the district court cannot grant relief on the [monetary] claims." *Smith* v. *United States*, 654 F.2d 50, 52 (Ct. Cl. 1981). Following such a judgment, the Court of Claims stated, the plaintiff may "come to our court armed with whatever collateral estoppel effects the district court decision would have." *Id.*[29]

This order of decision serves two related policy considerations. First, it makes more sense to bind the Article I Claims Court to determinations made by the Article III district courts than for the Article I tribunal to control the Article III forum. *See, e.g., Hahn* v. *United States*, 757 F.2d at 590. Second, "the policies of the APA take precedence over the purposes of the Tucker Act." *Delaware Div. of Health & Social Services* v. *United States DHHS*, 665 F. Supp. 1104, 1117 (D. Del. 1987), *appeal pending*. Congress waived sovereign immunity under the APA in order to make review of administrative action broadly available in the district courts. It would conflict with that policy to prevent the district courts from exercising their review function and awarding prospective relief merely because retrospective relief might also eventually be awarded in the Claims Court. The important role of judicial review in ensuring the evenhanded administration of justice and in legitimiz-

[29] The decisions of the Court of Claims were adopted as binding precedent by the Federal Circuit. South Corp. v. United States, 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc). Contrary to the Solicitor General's contention (Br. 36-37 n.29), the decision in Oliveira v. United States, 827 F.2d 735 (Fed. Cir. 1987), does not cast doubt on the continued vitality of *Smith*. The issue in *Oliveira* was the propriety of an award of attorney's fees; the language quoted by the Solicitor General described an unpublished ruling on an earlier appeal, which lacks any precedential value. *See* Fed. Cir. R. 18.

ing the function of administrative agencies[30] counsels strongly in favor of independent review by the Article III judiciary rather than review by untenured Article I officials. *See also* pages 6-8, *supra*.

II. THE DISTRICT COURT HAD AUTHORITY TO SET ASIDE THE DISALLOWANCES THAT HAD BEEN UPHELD BY THE BOARD

In addition to declaring the law and ordering prospective relief, the district court had the power to provide retrospective relief with respect to the particular disallowances at issue. Disallowances often are not recouped by the Secretary before actions for review are filed. Where this is the case, there can be no argument that the petition for review seeks an order requiring the payment of federal funds. Even where the funds are recouped prior to initiation of the action, an order setting aside a disallowance merely requires an adjustment in the running grant account between the state and the Secretary, not the payment of "money damages" within the meaning of the APA. Finally, no waiver of sovereign immunity is required to grant such retrospective relief because Medicaid funds have already been appropriated by Congress for the purpose of paying the federal share of eligible state program expenditures.

A. Petitions For Review Of Disallowance Decisions Often Are Filed Before The Amounts Are Deducted From The Next Quarterly Grant

States are permitted to retain funds that have been disallowed on audit pending a final decision by the Grant Appeals Board. *See* 42 U.S.C. § 1396b(d)(5). If the Board upholds the disallowance and the funds were previously drawn by the state, the Secretary recoups the funds by reducing the amount of a subsequent quarterly grant. *Id.* Although it did not occur in this case,

[30] *See, e.g.*, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-672 & n.3 (1986); S. Rep. No. 996, *supra*, at 4; *Sovereign Immunity Hearing*, *supra*, at 45.

the state typically can institute an action for judicial review of the disallowance decision before this recoupment takes place.

In these circumstances, "[t]he state [is] not seeking to have the federal government pay out any more money, but only trying to retain money that had already been paid to the state by the United States." *Matthews* v. *United States*, 810 F.2d 109, 112 (6th Cir. 1987). Since the state is not seeking "damages for the Government's *past* acts" but an injunction against future acts, the Tucker Act has no application. *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986) (emphasis added); *see Amoco Production Co.* v. *Hodel*, 815 F.2d 352, 361 n.10 (5th Cir. 1987); *Tennessee ex rel. Leech* v. *Dole*, 749 F.2d 331 (6th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). The district court therefore plainly has jurisdiction in these types of cases.[31]

There is no basis for treating the case any differently where the state elects not to retain the funds or where adjustment to the grant account otherwise takes place before the lawsuit is filed. No policy underlying the Tucker Act or sovereign immunity in general requires that such a case be brought in the Claims Court when the analogous pre-recoupment action is under the jurisdiction of the district court. Congress intended no such distinction when it changed the Medicaid law to require states to pay interest on retained funds and thereby encouraged them to allow the Secretary to adjust the grant account before final action by the Board.[32]

In addition, certain decisions of the Secretary concerning the scope of state Medicaid programs are reviewable

[31] District court jurisdiction would not be defeated by later recoupment, for two reasons. First, jurisdiction should be determined at the time of filing. Second, the state could obtain a preliminary injunction against recoupment in order to protect the district court's jurisdiction.

[32] *See* Pub. L. No. 96-499, § 961(a), 94 Stat. 2599, 2650 (1980); H.R. Rep. No. 1167, 96th Cong., 2d Sess. 90 (1980); H.R. Conf. Rep. No. 1479, 96th Cong., 2d Sess. 153 (1980).

directly in the regional courts of appeals, even where substantial federal funds are at stake. *See* 42 U.S.C. § 1316. There is no reason to take disallowance decisions—which raise similar substantial legal issues under the same laws—out of the district courts, with review in the same regional courts of appeals.[33]

B. Adjustment Of The Running Total In The State's Grant Account Does Not Constitute "Money Damages" That Are Excluded From The Waiver Of Sovereign Immunity In Section 702 Of The APA

The Solicitor General argues (Br. 21-34) that an order requiring the Secretary to adjust the state's grant account to restore federal financial participation for improperly disallowed funds constitutes "money damages" for which there is no waiver of sovereign immunity under the APA. This argument misapprehends the operation of federal grant programs as well as the scope of the limited exception intended by Congress in its reference to "money damages" in section 702 of the APA.[34]

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[33] Tucker Act cases are reviewable exclusively in the Federal Circuit. *See* 28 U.S.C. § 1295(a)(2) and (3); United States v. Fausto, 108 S. Ct. 668, 675 (1988).

[34] The Solicitor General also argues (Br. 34-35) that the request for retrospective relief falls outside the APA because the Tucker Act provides an "adequate remedy." The Tucker Act does not provide an adequate remedy for two reasons. First, it does not permit the plaintiff to obtain equitable relief in addition to monetary relief in a single action, which is particularly important in actions with prospective as well as retrospective effects. Second, while relief may be available in the Claims Court, any remedy under the Tucker Act in these circumstances is far from clear. *See* Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441, 1448-1451 (D.C. Cir. 1985). The federal government's argument in favor of its own liability under the Tucker Act (Br. 17 & n.14, 37, 44) is a telling indication of the unusual nature of its position in this case. Finally, whether or not the Tucker Act provides an adequate remedy for purposes of the APA, the retrospective aspect of the state's case may be maintained under 28 U.S.C. § 1331 even if it is outside the APA because Medicaid funds have already been appropriated. *See* pages 26-28, *infra*.

Federal funding for programs such as Medicaid is provided through quarterly advance "reimbursement" to the states based on estimates of future covered expenses, adjusted by the shortfall or excess of federal funding for actual state activities in prior quarters. *See* 42 U.S.C. § 1396b(d). An order reversing a disallowance decision does not have the effect of requiring the federal government to pay a discrete sum of money to the state; rather, the running total in the state's account is simply adjusted to reflect coverage of the activities in question. This does not come within the general understanding of "money damages."[35] It is instead more like a set-off, which has long been held not to require a waiver of sovereign immunity. *See, e.g., Bull* v. *United States*, 295 U.S. 247, 261-262 (1935).

Also unlike traditional money damages, adjustment of the grant account does not constitute compensatory relief substituting for a loss. To the contrary, it is better understood as specific relief requiring the return to the state of what was improperly taken by the federal government:

> "The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought—specific relief, not relief in the form of damages."

Maryland Dep't of Human Resources v. *DHHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.). This Court has elsewhere rejected arguments by the federal government that any action seeking the payment of money by the federal government falls exclusively within the Tucker Act, *United States* v. *Mottaz*, 476 U.S. 834, 850-851 (1986), and the same result should follow here.

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[35] *Cf.* School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 370-371 (1985) (local reimbursement under the Education of the Handicapped Act is not "damages" but "merely requires the Town to belatedly pay expenses that it should have paid all along").

The legislative history of section 702 of the APA confirms that Congress intended to limit the exception for "money damages" to traditional compensatory relief. *See Maryland Dep't of Human Resources*, 763 F.2d at 1447. This exception was understood to encompass relief "designed to compensate for harms done" rather than to except any order requiring the payment of money by the federal government.[36] As discussed above (page 11), Congress was aware that many actions for judicial review under the APA could result in monetary payments by the government, but it did not broadly exempt such actions from the waiver of sovereign immunity in section 702. The term "money damages" would not have been chosen to implement such an exemption. Rather, it appears that Congress merely intended to ensure that litigants could not use the APA to escape the limitations on the recovery of damages as traditional compensatory relief in contract and tort actions under the Tucker Act and the Federal Tort Claims Act.[37] Such actions bear no resemblance to a suit for judicial review of administrative action. *See Delaware Div. of Health and Social Services* v. *United States DHHS*, 665 F. Supp. 1104, 1117 (D. Del. 1987) (suit for judicial review is not a "claim against the United States" within the Tucker Act), *appeal pending*.

C. An Order Directing An Official To Disburse Appropriated Funds Does Not Require A Waiver Of Sovereign Immunity

Even if this suit were not within section 702 of the APA, it could be maintained under the general federal question jurisdiction of 28 U.S.C. § 1331 without any waiver of sovereign immunity. Where, as here, a suit seeks the release of funds already appropriated by Congress, the suit may be brought against a federal agency

[36] *See Sovereign Immunity Hearing*, *supra*, at 139.

[37] *See id.* ("Existing law governing money damages in tort and contract actions is left unchanged.").

or official without transforming it into one against the United States that might be barred by sovereign immunity.

Congress has authorized to be appropriated, and has appropriated, such sums as are necessary to carry out the purposes of the Medicaid program. *See* 42 U.S.C. § 1396. "The sums made available under this section shall be used for making payments to States" for activities performed under approved state Medicaid plans. *Id.* Under these circumstances, no waiver of sovereign immunity is necessary for an order requiring payment of federal funds for eligible services, because Congress has already directed that such funds be made available. For example, in an action seeking to compel federal Medicaid reimbursement for certain activities, a court of appeals reasoned as follows:

> "[Plaintiff] merely seeks funds • • • that the Congress has already appropriated for disbursal under the Medicaid Program rather than any monies which the Secretary would be compelled to expend from the United States Treasury without the Federal Government's consent. In appropriating these funds Congress has directed that they be used by the Secretary to fulfill his statutory obligations and achieve the declared purposes of the Medicaid Act. An action to compel a federal officer to distribute an annual appropriation made by Congress, as here, is not barred by sovereign immunity."

Springdale Convalescent Center v. *Mathews*, 545 F.2d 943, 950 (5th Cir. 1977).[38]

This rule was applied in several impoundment cases in the early 1970s, which were brought directly under section 1331 before the amendment of the APA in 1976. In these cases, the courts held that an injunction requiring the release of appropriated funds was not barred by

[38] *But cf.* Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471, 473-474 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983).

sovereign immunity because such relief "would go no further than to require the spending of funds already appropriated by Congress to achieve the declared purposes of the Act." *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973); *accord State Highway Comm'n* v. *Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973) ("The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.").[39]

This Court has similarly rejected the defense of sovereign immunity in cases brought to enjoin government officials from interfering with the payment of federal benefits. In *Miguel* v. *McCarl*, 291 U.S. 442 (1934), for example, the Court held that the United States was not an indispensable party to an action seeking to enjoin officials from preventing the payment of military retirement benefits. *See also Smith* v. *Jackson*, 246 U.S. 388, 391 (1918) (order requiring auditor to release salary to federal employee is not a judgment "for money but relates solely to the obligation to perform a manifest public duty"). Here as well, the Secretary may be enjoined to comply with the Medicaid Act, even if this requires the release of appropriated federal funds.

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[39] *See also* City of Los Angeles v. Coleman, 397 F. Supp. 547 (D.D.C. 1975); People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 724 (N.D. Ill. 1973); City of New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub nom.* City of New York v. Train, 494 F.2d 1033 (D.C. Cir. 1974), *aff'd*, 420 U.S. 35 (1975).

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases remanded with instructions that the district court had authority to order complete relief in favor of the state.

Respectfully submitted,

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